

**United States Department of Labor
Employees' Compensation Appeals Board**

S.A., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Edison, NJ, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket Nos. 14-1187; 14-1215
Issued: February 2, 2015**

Appearances:

James D. Muirhead, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge

COLLEEN DUFFY KIKO, Judge

MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 28, 2014 appellant, through counsel, filed timely appeals from the November 14, 2013 and March 19, 2014 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). The last merit decision of record was the April 30, 2013 decision of OWCP. Because more than 180 days elapsed between the last merit decision and the filing of appeals on April 28, 2014, and pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3,² the Board lacks jurisdiction to review the merits of the claims.³

¹ 5 U.S.C. §§ 8101-8193.

² Appellant also filed an appeal of an OWCP "decision" dated February 26, 2014 but the Board notes that this represents an informational letter rather than a final decision of OWCP and therefore it is not appealable to the Board. 20 C.F.R. § 501.2(c). The appeals for Docket No. 14-1187 and Docket No. 14-1215 concern different work injuries initially developed under separate file numbers (xxxxxx003 and xxxxxx402), but beginning in early 2013 these cases were administratively associated with the same file number (xxxxxx003).

³ See 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits of her claim as the request were untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

OWCP accepted that on October 5, 2009 appellant, then a 34-year-old letter carrier, sustained a medial meniscus tear of her left knee due to a fall down stairs at work. Appellant stopped work on October 5, 2009 and began to receive compensation on the daily rolls.⁴

On January 12, 2010 Dr. Jeffrey F. Augustin, an attending Board-certified orthopedic surgeon, performed a left knee arthroscopy with lateral meniscectomy and excision of plica. The surgery was authorized by OWCP.

In a June 17, 2010 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective June 17, 2010 on the grounds that she ceased to have residuals of her October 5, 2009 work injury after that date. It based its termination action on a May 30, 2010 report of Dr. Augustin and a May 3, 2010 report of Dr. Jerome D. Rosman, a Board-certified orthopedic surgeon, who served as an OWCP referral physician.

By decision dated November 17, 2010, OWCP modified its June 17, 2010 termination decision to reflect that only appellant's wage-loss compensation was terminated effective June 17, 2010. It indicated that the proposed notice of termination sent to appellant failed to mention that her medical benefits related to the October 5, 2009 work injury would be terminated.

On June 26, 2012 appellant alleged that she sustained a left knee injury at work on June 20, 2012 when she stepped down off a curb. She indicated that she felt a tug and twist in her knee and heard a popping sound.⁵

In an August 9, 2012 decision, OWCP denied appellant's claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained a left knee injury in the performance of duty on June 20, 2012.

On October 22, 2012 Dr. Allen Glushakow, an attending Board-certified orthopedic surgeon, performed left knee surgery, including abrasion arthroplasty, chondroplasty, arthrotomy, and partial lateral meniscectomy. He noted that during the surgery he observed an effusion and osteochondral fracture of the medial femoral condyle and an acute tear of the lateral meniscus. The surgery was not authorized by OWCP.

⁴ Appellant later began to receive compensation on the periodic rolls.

⁵ This claim was initially developed under file number xxxxxx402, but beginning in early 2013 the documents for this claim were administratively associated with file number xxxxxx003, the file created for appellant's October 5, 2009 injury.

In a decision dated February 20, 2013, an OWCP hearing representative modified OWCP's August 9, 2012 decision to accept the condition of left knee sprain as occurring on June 20, 2012 "with entitlement to medical benefits being limited to the claimant's emergency room visit on June 20, 2012." He stated, "The district office denial of the claim for any other left knee condition and for benefits subsequent to June 20, 2012 is affirmed."

In an April 30, 2013 decision, OWCP advised appellant that her claim for a traumatic injury on June 20, 2012 had been formally accepted for a left knee sprain. It noted that, per its February 20, 2013 decision, authorization for medical treatment was limited to treatment at the emergency room on June 20, 2012. OWCP stated, "If the current accepted condition(s) need to be revised or additional complications related to the current accepted condition(s) need to be added, your physician should explain in writing, with medical rationale, the relationship between any additional condition and the work injury or the current accepted condition(s) noted above."

In an informational letter dated June 10, 2013, OWCP advised appellant that her claim for compensation for the period October 22, 2012 to March 18, 2013 was not payable. It informed appellant that, in its November 17, 2010 decision, it had terminated her wage-loss compensation effective June 17, 2010.

In a July 17, 2013 letter received on that date, counsel, on behalf of appellant, sought compensation for appellant's October 22, 2012 left knee surgery and any periods of disability related to her accepted work-related knee condition. He stated, "[Appellant] underwent surgery by Dr. Glushakow under the above file in October 2012. Clearly, this is new evidence and was not available on June 17, 2010. She is now disabled as a result of the effects of the surgery."⁶

In a November 14, 2013 decision, OWCP denied appellant's case finding that she filed an untimely reconsideration request which failed to demonstrate clear evidence of error in a prior OWCP decision. It indicated that the June 10, 2013 "decision" for which appellant was considered to have requested reconsideration was an informational letter rather than a final decision of OWCP and therefore appellant could not request reconsideration of this decision. OWCP found that appellant's July 17, 2013 reconsideration request was not timely filed with respect to the November 17, 2010 decision (which modified the June 17, 2010 decision) and that her application for review did not show clear evidence of error in that decision. It stated, "Your attorney does not argue that the decision dated November 17, 2010 was incorrect when it was issued."

On January 30, 2014 appellant filed a claim for disability due to her work-related left knee condition, alleging that she was unable to work for periods beginning June 20, 2012.

In an informational letter dated February 26, 2014, OWCP advised appellant that it only accepted that she sustained a left knee sprain on June 20, 2012 and that her case was only open for payment of medical bills related to an emergency room visit on June 20, 2012. It indicated that appellant had previously been provided with appeal rights in connection with prior decisions on this matter.

⁶ Counsel also stated he wished to "appeal" June 17, 2010 and June 10, 2013 "decisions" of OWCP. As noted above, the June 10, 2013 document was an informational letter rather than a final decision of OWCP.

In a March 5, 2014 letter received on the same date, counsel, on behalf of appellant, indicated that he was submitting evidence which he felt supported coverage of appellant's October 22, 2012 surgery. In the attached June 25, 2013 report, Dr. Glushakow explained why he felt that appellant's need for repeat left knee surgery on October 22, 2012 was due to her June 20, 2012 injury rather than an earlier injury. He stated:

"While the [October 22, 2012] operative report did not show a tear of the medial meniscus, there was an effusion and osteochondral fracture of the medial femoral condyle as well as an acute tear of the lateral meniscus. In addition, a marked synovitis was noted requiring a subtotal synovectomy, all of which is described in the operative report. [Appellant] had made a full recovery from the surgery performed on January 12, 2010. Prior operative report[s] did not note an osteochondral fracture and did not note synovitis. Therefore, the combination of these findings point to the cause of her surgery being the incident of June 20, 2012."⁷

In a March 19, 2014 decision, OWCP refused to reopen appellant's case for further review of the merits of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error. It found that the March 5, 2014 letter submitted by counsel on behalf of appellant was an untimely reconsideration request and did not show clear evidence of error in OWCP's prior decisions, including its decision dated April 30, 2013.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁸ OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁹ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁰ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.¹¹

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must

⁷ Counsel also stated that he wished to "appeal" the April 30, 2013 decision of OWCP and that he wished to "request reconsideration."

⁸ Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.606(b)(2).

¹⁰ *Id.* at § 10.607(a).

¹¹ *Id.* at § 10.608(b).

nevertheless undertake a limited review to determine whether the application establishes “clear evidence of error.”¹² OWCP regulations and procedure provide that OWCP will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant’s application for review shows “clear evidence of error” on the part of OWCP.¹³

In order to be entitled to reimbursement of medical expenses, it must be shown that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.¹⁴ An employee seeking compensation for disability and/or a specific condition under FECA has the burden of establishing the essential elements of his or her claim including the fact that the individual is an “employee of the United States” within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.¹⁵ It is well established that proceedings under FECA are not adversarial in nature, and while the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹⁶

ANALYSIS

OWCP accepted that on October 5, 2009 appellant sustained a medial meniscus tear of her left knee due to a fall down stairs at work. On January 12, 2010 appellant underwent OWCP-authorized left knee arthroscopy with lateral meniscectomy and excision of plica. In a June 17, 2010 decision, OWCP terminated her wage-loss compensation and medical benefits effective June 17, 2010 on the grounds that she ceased to have residuals of her October 5, 2009 work injury after that date. By decision dated November 17, 2010, it modified its June 17, 2010 termination decision to reflect that only appellant’s wage-loss compensation was terminated effective June 17, 2010. OWCP indicated that the proposed notice of termination sent to appellant failed to mention that her medical benefits related to the October 5, 2009 work injury would be terminated.

Appellant’s claim for her October 5, 2009 injury was dormant until October 2012 after she underwent left knee surgery. On October 22, 2012 Dr. Glushakow, an attending Board-certified orthopedic surgeon, performed left abrasion arthroplasty, chondroplasty, arthrotomy, and partial lateral meniscectomy. The surgery was not authorized by OWCP. In a July 17, 2013 letter received on that date, counsel, on behalf of appellant, sought compensation for appellant’s

¹² See *id.* at § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹³ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5a (October 2011). OWCP procedures further provide, “The term ‘clear evidence of error’ is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made a mistake.”

¹⁴ *Bertha L. Arnold*, 38 ECAB 282, 284 (1986).

¹⁵ *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

¹⁶ *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

October 22, 2012 left knee surgery and any period of disability related to her accepted work-related left knee condition.

Under a separate case file (now combined with the file for the October 5, 2009 injury), appellant alleged in late June 2012 that she sustained a left knee injury at work on June 20, 2012 due to stepping down off a curb. After initially being denied, her claim for a June 20, 2012 work injury was accepted for left knee sprain in OWCP decisions dated February 20 and April 30, 2013.¹⁷ In a March 5, 2014 letter, counsel, on behalf of appellant, indicated that he was submitting evidence which he felt supported coverage of appellant's October 22, 2012 surgery.¹⁸

The Board finds that OWCP improperly found that counsel's communications on behalf of appellant constituted a request for reconsideration of its November 17, 2010 decision which modified its June 17, 2010 termination decision to reflect that only appellant's wage-loss compensation was terminated effective June 17, 2010. It is clear, however, that in a July 17, 2013 letter, counsel expressly sought compensation for appellant's October 22, 2012 left knee surgery and any periods of disability related to her accepted work-related knee condition. In a March 5, 2014 letter, he indicated that he was submitting evidence which he felt supported coverage of appellant's October 22, 2012 surgery. Medical evidence was submitted in support of this claim, including a June 25, 2013 report in which Dr. Glushakow stated that the October 22, 2012 surgery was necessitated by a work-related injury. Moreover, appellant filed a claim for disability due to her work-related left knee condition, alleging that she was unable to work for periods beginning June 20, 2012.¹⁹ Consequently, OWCP improperly analyzed appellant's case and wrongly determined, in November 14, 2013 and March 19, 2014 decisions, that she filed an untimely request for merit review and failed to show clear evidence of error in its November 17, 2010 decision.²⁰

The Board finds that appellant has an outstanding claim related to her October 22, 2012 left knee surgery and any periods of disability arising after June 20, 2012. The case shall be remanded to OWCP for consideration of this claim. OWCP should consider all the relevant documents relating to both appellant's accepted October 5, 2009 left knee injury and her accepted June 20, 2012 left knee injury.²¹ After carrying out this development, OWCP shall issue an appropriate decision on the matter.

¹⁷ However, OWCP found in these decisions, with respect to the June 20, 2012 injury, appellant's authorization for medical treatment was limited to treatment at the emergency room on June 20, 2012.

¹⁸ On January 30, 2014 appellant filed a claim for disability due to her work-related left knee condition, alleging that she was unable to work for periods beginning June 20, 2012.

¹⁹ Although counsel used the words "appeal" and "reconsideration" in some of his letters, the content and context of the letters show that he actually sought payment for appellant's October 22, 2012 left knee surgery and any periods of disability arising after June 20, 2012.

²⁰ See *supra* notes 7 through 12.

²¹ Beginning in early 2013, these cases were administratively associated with the same file number (xxxxxxx003).

CONCLUSION

The Board finds that the case shall be remanded to OWCP for consideration of her outstanding claim for payment related to her October 22, 2012 left knee surgery and any periods of disability arising after June 20, 2012.

ORDER

IT IS HEREBY ORDERED THAT the March 19, 2014 and November 14, 2013 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded to OWCP for proceedings consistent with this decision of the Board.²²

Issued: February 2, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

²² Michael E. Groom, Alternate Judge, participated in the original decision but was no longer a member of the Board effective December 27, 2014.